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IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1938.

No.  15

L. BOTELER, Trustee of the Estate of RICHMAID CREAMERIES, INC., a corporation, Debtor,

Petitioner,

vs.

RAY INGELS, Director of Motor Vehicles of the State of California; HOWARD E. DEEMS, as Registrar of Motor Vehicles of the State of California, and the MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA,

 16 *Respondents.*

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Petitioner,

vs.

RAY INGELS, Director of Motor Vehicles of the State of California, and HOWARD E. DEEMS as Registrar of Motor Vehicles of the State of California,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT, AND
BRIEF IN SUPPORT THEREOF.**

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Respondents.

**PETITION FOR WRIT OF CERTIORARI TO
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APPEALS FOR THE NINTH CIRCUIT.**

L. Boteler, Trustee of the Estate of Richmaid Creameries, Inc., a bankrupt corporation, as your petitioner, respectfully prays that a Writ of Certiorari issue to review a judgment entered December 15, 1938, in the United States Circuit Court of Appeals for the Ninth Circuit in cases numbers 8711 and 8761 entitled "Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, as Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, Appellants, vs. L. Boteler, Trustee of the Estate of Richmaid Creameries, Inc., a corporation, Debtor, Appellee" and "Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, Appellants, vs. L. Boteler, Trustee of Richmaid Creameries, Inc., a corporation, Appellee." These cases are both based upon the same facts and were consolidated in the Circuit Court for purposes of briefing and were determined by the Honorable Circuit Court in a single decision. It will serve the purposes of convenience of this Honorable Court that the two cases be treated as consolidated herein.

Questions Presented.

- Is a bankrupt estate liable for penalties imposed by state statutes for non-payment of automobile license fees where license fees and penalties claimed accrued during operation for purposes of liquidation of the business of the bankrupt estate by the Trustee in Bankruptcy?

Statement.

Briefly stated, the facts upon which the foregoing question arose, are as follows:

(The statement of facts following is digested from the opinion of the Honorable Ninth Circuit Court of Appeals.)

Richmaid Creameries, Inc., was engaged in the creamery business and owned certain milk and ice-cream routes, operating twenty-seven automobiles and trucks in the course of such business. Under date of September 26, 1936, it filed its petition under section 77B of the Bankruptcy Act. A temporary Trustee was appointed. Thereafter and on December 22, 1936, the District Court finding that the operations of the temporary Trustee resulted only in loss, entered its order of liquidation and referred the case to the Referee in Bankruptcy. On January 20, 1937, L. Boteler was appointed Trustee in Bankruptcy for the purpose of liquidating the assets of Richmaid Creameries, Inc. Inasmuch as the assets were of little value in liquidation unless deliveries on the milk and ice cream routes were maintained, the Trustee continued to operate the business until February 28, 1937, when the Referee in Bankruptcy approved a sale of the routes and certain equipment. In order to keep operating, upon a number of occasions, the Trustee was compelled to advance his own personal funds to the estate so that there would be no cessation in the making of deliveries.

The California Motor Vehicle license fees become due on January 1st of each year. If such fee is not paid with-

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in thirty days a penalty designated by statute attaches. The penalty is added to the fee on all applications for renewals and transfers on and after February 5. The California statute further provides that the fees and penalties constitute a lien on the vehicle from which such fee and penalty is due from the time the same becomes due.

On or about February 27, 1937, the Trustee applied to the Department of Motor Vehicles of the State of California for 1937 license plates on the motor vehicles belonging to the bankrupt estate. He tendered all of the fees due, but not the penalties. The Department refused to issue the licenses unless the fees were accompanied with the penalties.

Thereafter the Trustee, by petition, secured an order from the Referee in Bankruptcy to compel the respondents herein to show cause why the penalties should not be set aside; why the 1937 license plates should not be issued on the payment of the fees, exclusive of the penalties; why the respondents should not be required to immediately file such claims as they asserted to the bankrupt estate or be forever barred; and, why the Trustee should not be authorized to sell the motor vehicles free and clear of any and all liens claimed by the Motor Vehicle Department upon said vehicles. Following a hearing, the Referee made an order setting aside all of the penalties assessed against the motor vehicles and directing the Trustee to sell them free and clear of any and all liens thereon. The order further commanded the respondents Ingels and Deems to file claims in bankruptcy for the registration and license fees upon said

motor vehicles within thirty days from the date of the order or be forever barred. A petition to the District Court to review said order was denied and the order of the Referee was confirmed.

The Trustee had also petitioned the Referee for an order directing the respondents to accept the principal of the license fees in full payment of any and all sums owing by the bankrupt estate on said motor vehicles and enjoining collection or attempted collection by them of any penalties under the California statutes. The Referee declined to include such mandate in his order and an application was made by the Trustee to the District Court for a mandatory injunction to such effect. The District Court issued such an order. Appeal was allowed the respondents from each order, the former culminating in case No. 8711 in the Circuit Court of Appeals for the Ninth Circuit and the latter being case No. 8761 in said Circuit Court. Since both cases involved identical facts, they were consolidated for briefing and hearing and were disposed of in one opinion by the Circuit Court.

The Circuit Court of Appeals for the Ninth Circuit reversed the order of the District Court in each case with directions to order the registration and license fees and accrued penalties paid, or, in the alternative, to permit the vehicles to be disposed of, subject to a lien of the State of California for the unpaid taxes and penalties. The Circuit Court held that because the taxes were not due and payable at the time of the filing of the petition they were not "provable" debts and therefore unaffected by the pro-

hibitions of section 57j of the Bankruptcy Act (11 U. S. C. A., Sec. 93 (j)). The Court further held that by virtue of the Act of June 18, 1934, (48 Stats. 993, 28 U. S. C. A., Sec. 124(a)), the Trustee in Bankruptcy is subjected to the *penalties* and *lien* of the State of California.

In reaching its conclusion, the Court was confronted with the decision to the contrary of the Circuit Court of Appeals for the Seventh Circuit, to wit, the case of *In re Messenger's Merchants Lunch Rooms, Inc.*, 85 Fed. (2d) 1002. The Honorable Ninth Circuit Court declared:

"In so far as the decision *In re Messenger's Merchants Lunch Rooms, Inc.* (C. C. A. 7), 85 Fed. (2nd) 1002, cited by the appellee as authority for affirmance, is in conflict herewith, it is expressly disapproved."

It is in consequence of said judgment and act of the Circuit Court of Appeals of the Ninth Circuit that your petitioner seeks review by *certiorari* in this Honorable Court to determine the liability of a bankrupt estate to tax penalties which accrue as a result of operations of the Trustee during the pendency of the bankrupt estate.

Reasons Relied Upon for Allowance of the Writ.

It is respectfully submitted by your petitioner and relied upon as reasons for the granting of the writ that:

- (a) The act of the Circuit Court of Appeals for the Ninth Circuit in holding that the bankrupt estate is liable for penalties accruing during the pendency of the bankruptcy is contrary to Section 57j of the Bankruptcy Act and defeats the purpose and scope of the Bankruptcy Act as defined by Congress.
- (b) That the act of the Circuit Court of Appeals for the Ninth Circuit is of peculiar public interest and presents a fundamental question of law upon which there should be no diversity of opinion in the several Circuit Courts of Appeal. That the decision of the Circuit Court of Appeals for the Ninth Circuit is in direct conflict with the Circuit Court of Appeals for the Seventh Circuit, in the case of *In re Messenger's Merchants Lunch Rooms, Inc.*, 85 Fed. (2d) 1002, and with the Circuit Court of Appeals for the Third Circuit in the case of *New Jersey v. Pressed Steel Car Co.*, 100 Fed. (2d) 147. That the uncertainty created by the conflict in the Circuit Courts adversely affects the expeditious administration and closing of innumerable pending bankruptcy cases and will continue to so affect such cases and future bankruptcy cases until and unless this Court shall exercise its power of supervision and hear and determine the present question.

Wherefor, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, directing that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket: "No. 8711, Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, as Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, Appellants, vs. L. Boteler, Trustee of the Estate of Richmaid Creameries, Inc., a corporation, Debtor, Appellee," and "No. 8761, Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, Appellants, vs. L. Boteler, Trustee of Richmaid Creameries, Inc., a corporation, Appellee," and that the judgment of said Court be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

March, 1938.

THOMAS S. TOBIN,

Counsel for Petitioner.

DAVID SCHWARTZ,

RAPHAEL DECHTER,

JOSEPH J. RIFKIND,

Of Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Opinion Below.

No opinion was written by the District Court. The opinion in the United States Circuit Court of Appeals for the Ninth Circuit was filed December 15, 1938, and is reported in 100 Fed. (2d) 915.

Jurisdiction.

The judgment of the Circuit Court of Appeals was filed on December 15, 1938. No petition for rehearing in that Court was filed. This petition for Writ of Certiorari is filed within three months after the filing of the judgment of the Circuit Court of Appeals for the Ninth Circuit.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, 28 U. S. C. A. 347.

Statement of the Case.

The essential facts of the cases herein are stated in the accompanying petition for Writ of Certiorari and in the interest of brevity are not repeated herein.

Specification of Errors.

The Circuit Court of Appeals erred in each of the following particulars:

1. In holding that Section 57j of the Bankruptcy Act is not applicable to penalties which accrue during the course of the administration of a bankrupt estate, while the estate is being operated incidental to its liquidation.
2. In holding that the State of California has a lien on the property of the bankrupt estate which lien accrued during the course of administration of the bankruptcy estate.

3. In holding that the Act of June 18, 1934 (48 Stat. 993, 28 U. S. C. A., Sec. 124 (a)) subjects the Trustee in Bankruptcy to liability for penalties attached to State taxes.
4. In holding that both the District Court and the Referee in Bankruptcy erred in finding that the Trustee had no funds with which to pay the motor vehicle taxes.

Argument and Authorities in Support of Petition.

We first quote at this point the relevant portions of the applicable statutes involved in this case:

Section 3 of the California Vehicle License Fee Act, as amended by Chapter 6 of California Statutes of 1937:

"Except as hereinafter provided, the license fee hereby imposed shall be due and payable to the department on the first day of January of each year. Such fee shall be paid to the department at the time of registration or renewal of registration of such vehicle." (Chap. 362, Cal. Stats. 1935 as amended by Chap. 6, Cal. Stats. 1937, p. 62.)

Section 6 of the California Vehicle License Fee Act (*ibid.*):

"Whenever any vehicle is operated upon any highway of this State without the license fee having first been paid as required by this act, such fee is delinquent. If such fee is not paid within thirty days after the same becomes delinquent, a penalty equal to one-half such fee shall be added thereto and collected therewith. If, however, the annual registration of a vehicle is being renewed, such penalty shall be added to any payment made on or after February 5, unless the vehicle has not been operated on the highways since the expiration of the prior registration."

Section 378 of the California Vehicle Code:

“When Fees Delinquent. Penalties. (a) Whenever any vehicle is operated upon any highway of this State without the registration fee having first been paid as required by this code, such fee is delinquent.

(b) A penalty shall be added upon any application for annual renewal of registration made on or after February 5 unless the vehicle has not been operated on the highways since the expiration date.

(c) Except as otherwise provided in subdivision (b), if any fee is not paid within thirty days after the same becomes delinquent a penalty shall be added thereto.

(d) In every event the penalty shall be equal to the fee and shall be collected therewith.”

Section 379(a) of the California Vehicle Code:

“Every registration or transfer fee and any penalty added thereto, from the date the same became due, constitute a lien upon the vehicle for which due.”

Section 57j of the Bankruptcy Act:

“Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or for forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.” (11 U. S. C. A., Sec. 93(j)).

Act of Congress, June 18, 1934:

"Any * * * trustee * * * appointed by any United States Court who is authorized by said court to conduct any business, or who does conduct any business, shall * * * be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation * * *." (48 Stat. 993, 28 U.S.C. A.; Sec. 124(a)).

It is not denied that the Vehicle License Fee Act of the State of California imposes a penalty for non-payment of the motor vehicle licenses, nor is it denied that were this not a bankruptcy proceeding the penalties would have accrued. It is the position of the petitioner, however, that Section 57j of the Bankruptcy Act was enacted for the purpose of protecting creditors of a bankrupt estate from being burdened with the payment out of the assets of the bankrupt estate of such claims which do not represent anything other than the imposition of a penalty. The equitable reasons behind such a rule are obvious. Creditors of a bankrupt estate find themselves seeking salvage out of the assets of an insolvent debtor. It is only fair that such assets as represent the salvage of the bankrupt's property should be applied to the payment of such claims that have a substantial basis, rather than those which owe their existence to the punitive power of a governmental body which is exacted for the purpose of compelling the payment of taxes or other obligations. That this is the intention of Congress can be read from the limitation in Section 57j, which provides that the penalties are not allowable, except in so far as they represent "reasonable and actual costs occasioned" by the delinquencies.

The decision of the Circuit Court in the instant case appears to be the first case in which any of the United States Courts have limited the term "debts" as specifically used in Section 57j of the Bankruptcy Act to "provable" claims. As an example of the fact that no such distinction has heretofore been made, the Circuit Court of Appeals for the Third Circuit in the case of *New Jersey v. Pressed Steel Car Co.*, 100 Fed. (2d) 147, was confronted with a question involving franchise taxes owing to the State of New Jersey for a period of three years. The first of the three years involved taxes prior to an equity receivership, the second year involved franchise taxes during the equity receivership, and the third year involved franchise taxes for the period after a petition under Section 77B of the Bankruptcy Act was filed and the taxpayer was undergoing reorganization under such section. It is most significant to note that although penalties were sought for each of the three years, that in denying such penalties, the Honorable Circuit Court of Appeals for the Third Circuit did not make any distinction and declared that Section 57j of the Bankruptcy Act barred the recovery as to the penalties, in each of the three years.

Nor did the Honorable Seventh Circuit Court of Appeals invoke the limitation of the Ninth Circuit Court of Appeals in this case when the Honorable Seventh Circuit Court determined the case of *In re Messenger's Merchants Lunch Rooms, Inc.*, 85 Fed. (2d) 1002. In that case the facts revealed that the taxes out of which the penalties grew accrued during the course of the administration of the bankruptcy estate. The Honorable Seventh Circuit Court of Appeals looked directly to the intention of Congress in enacting Section 57j of the Bankruptcy

Act and consistent to the purpose of Congress held that the penalties could not be recovered.

The interpretation of laws are effected by the construction given to them over a period of years. The fact that no courts, with the exception of the Ninth Circuit, in the instant case, have yet placed any such limitation on Section 57j from its enactment in 1898 to date, makes it apparent that no such limited and technical construction as has been given to such section by the Honorable Ninth Circuit Court should be permitted to stand.

The reason for relieving a bankrupt estate from penalties is not affected by the question of whether or not the penalty accrued before or after the bankruptcy took place. In either event the Trustee in Bankruptcy is holding the property for the benefit of creditors and in either event the same strong considerations to safeguard the corpus of the property from unreasonable charges exists.

Nor does the Act of June 18, 1934 alter the result. This Act merely provides that the Trustee will be subjected to the same taxes as if the property he is operating were operated by an individual or a corporation. Had Congress intended by virtue of this section thus to repeal or limit Section 57j of the Bankruptcy Act, it would have been a simple matter to have included therein the provision that such a Trustee would be liable also to *penalties*. Taxes and penalties are in different categories. The tax consists of a payment for a privilege to a governmental body. The penalty, on the other hand, constitutes a punitive method of collection by a taxing body. The significant omission of penalties from the Act of 1934 should make it apparent that Congress did not intend to affect the prohibition of Section 57j against the allowability of penalties.

In effect the decision of the Honorable Ninth Circuit Court is that Section 57j of the Bankruptcy Act has been impliedly repealed by the Act of June 18, 1934 in so far as penalties accruing during bankruptcy administration is concerned. Such holding violates the long established doctrine of this Honorable Court that repeals by implication are not to be favored.

The subject matter of this petition is of great importance because it affects the administration of innumerable bankruptcy estates. If the conflict between the Ninth Circuit Court of Appeals on the one hand and the Seventh and Third Circuits on the other hand continues to exist, the expeditious closing of many bankruptcy estates will be forestalled by the uncertainty created thereby. It is likely that many penalties will be unlawfully collected on the strength of the decision of the Ninth Circuit, for the reason that penalties assessed, although of substantial importance to the creditors, may nevertheless be too small to permit litigation and the loss of time incidental thereto, which will be occasioned by the conflict between the Circuit Courts. This Honorable Court has not as yet had the occasion to construe Section 57j of the Bankruptcy Act in so far as it is applicable to the operations of the Trustee in Bankruptcy of a bankrupt estate. We respectfully pray that this Honorable Court take jurisdiction in the premises herein.

March 9, 1939.

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